No. 14,428

United States Court of Appeals

For the Ninth Circuit

JOSEPH A. ELLIOTT,

Appellant,

vs.

PACIFIC FAR EAST LINES, INC., a corporation, Claimant of S. S. "Canada Bear", etc.,

Appellee and Cross-Appellant.

OPENING BRIEF OF CROSS-APPELLANT.

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Proctor for Claimant and Cross-Appellant.

Subject Index

Table of Authorities Cited

Statutes

Constitutions

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JURISDICTION.

The suit is one for wages claimed to be due the libellant (cross-appellee here) and for double wages on the theory that the libellant was discharged at Yokohama, Japan and was not paid within the time required by statute. Thus it is clear that it is a case of admiralty and maritime jurisdiction. As such the District Court of the United States was vested with original jurisdiction. (U. S. Constitution, Article III, Sections 1 and 2.) The final decree was entered in the Court below on April 12, 1954. (Tr. Vol. 1, p. 33.) Libellant's notice of appeal was filed May 6, 1954

(Tr. Vol. 1, p. 36) and claimant's notice of appeal was filed June 29, 1954 (Tr. Vol. 1, p. 49). Therefore, pursuant to the provisions of Title 28 U.S.C. Sections 1281 and 2107, this Honorable Court is vested with appellate jurisdiction.

STATEMENT OF THE CASE.

In the first cause of action of the first amended libel *in rem,* the libellant alleged that, on or about May 8, 1952, he signed regular shipping articles at San Francisco, California, for a voyage on the S. S. "Canada Bear" "not exceeding 12 calendar months, and back to the continental United States". He alleged that his wages were fixed at $275.00 per month and that they were increased to the sum of $286.00 per month; and that on the 18th day of June, 1952, "libellant fell ill while the said S. S. 'Canada Bear' was at Yokohama, Japan, and was taken to a hospital for treatment, and was required to remain in said hospital until his vessel had sailed from Yokohama, and by reason thereof, libellant was repatriated to the United States direct from Yokohama, Japan, and did not join his vessel". He also alleged that from May 8, 1952, to and including the 18th day of June, 1952, he earned as wiper on the said vessel the sum of $579.24; that during his employment he drew upon his wages the approximate sum of $200.00; and that there was a balance of earned wages due him of $379.24 as of June 18, 1952. (Tr. Vol. 1, pp. 3-4.)

In the second cause of action, first amended libel, it is alleged, by way of conclusion, "that pursuant to Title 46, Section 596, U. S. Code, and Title 46, Section 597, U. S. Code, libelant became entitled to all of his wages at the time he left the S. S. 'Canada Bear' on June 18, 1952."

In substance, all that the second cause of action alleges as ultimate facts is that on June 18, 1952, libellant *fell ill* while the vessel was at Yokohama, Japan; that he was taken to a hosiptal for treatment and was required to remain in the hospital until the vessel had sailed from Yokohama; that the balance of his earned wages at said time was the sum of $379.24; that none of his wages were left at Yokohama, Japan; that on June 18, 1952, prior to the sailing of the vessel he advised the agent of the S. S. "Canada Bear" that he was in the hospital; that the master of the vessel was advised prior to his sailing that libellant was in the hospital; and that notwithstanding said knowledge the master refused, failed and neglected to pay to the libellant or to leave with the agent of the S. S. "Canada Bear" at Yokohama, Japan, or with the United States Consul at said place, the wages due libellant for his services on the S. S. "Canada Bear". (Tr. Vol. 1, pp. 4-5.)

Claimant's (cross-appellant) answer denied the allegations with reference to the length of the voyage and as to the amount of monthly wages, and alleged that the wage rate provided for in the shipping articles was the sum of $262.99, at the time they were executed, and later (as of May 15, 1952) increased to

the rate of $274.79 per month. (Tr. Vol. 1, p. 9.) Claimant also denied that the libellant fell ill while the S. S. "Canada Bear" was at Yokohama or that by reason of any illness the libellant was required to remain in any hospital or that he did not rejoin his vessel by reason of any illness; and alleged that the only reason for his failure to rejoin his vessel at Yokohama, Japan, was that he voluntarily became intoxicated and was unable by reason of his intoxication to rejoin his vessel or to perform his contract. Claimant also alleged that "on or about the 25th day of July, 1952, the libellant executed a mutual release as required by Revised Statutes of the United States 4552 wherein he agreed that there were no wages whatever due him and said mutual release is on file at the office of the United States Shipping Commissioner at San Francisco, California, and claimant denies that there is due to the libellant the sum of $379.24, or any other sum whatsoever or at all." (Tr. Vol. 1, pp. 10-11.)

The claimant also denied that by reason of any statute, or otherwise, libellant became entitled to wages in any sum whatsoever or at all at the time he left the S. S. "Canada Bear" on June 18, 1952; admitted that no wages were left at Yokohama, Japan; and denied that there was any duty or obligation to leave any wages at Yokohama, Japan. Claimant also denied that any demand was made upon respondent on July 25, 1952, for any wages due libellant or that any wages were due and admitted that no payment was made to libellant on July 25, 1952. It was also denied that the

master of the vessel was advised prior to sailing that libellant was in the hospital or that the master refused, failed and neglected to pay to the libellant the wages due libellant for his services on the vessel. (Tr. Vol. 1, pp. 12-13.)

The vessel arrived at Yokohama, Japan, on June 17, 1952. Libellant went ashore that night, returned to the vessel and went ashore again on June 18, 1952. (Tr. Vol. 11, pp. 7-8.) Prior to leaving the vessel and going ashore the last time he knew that it was going to sail the next day. He went to a moving-picture show and about 10 P.M. (June 18, 1952) he began to drink. Shortly before midnight he went from a drinking place into a taxicab to take him to where he could get a water taxi and did not know anything that happened after getting into the taxicab until he woke up in the hospital. (Tr. Vol. 11, p. 45.) When he woke up in the hospital on the morning of June 19, 1952 he called the agent for the Pacific Far East in Yokohama, told him who and where he was and was told by the agent that he knew libellant was "in there". The agent asked libellant what he wanted to do and libellant "asked him how about sending me some money" when he got a chance. The agent asked libellant how much and was told "$50.00" which the agent brought to libellant about a week later, stating that he had been so busy he wasn't able to get over there any sooner. (Tr. Vol. 11, pp. 8-10.)

Libellant was repatriated to the United States on the S. S. "China Bear" one of the ships of the Pacific Far East Steamship Company. When he got out of

the hospital on June 30, 1952, the S. S. "Canada Bear" was not in Yokohama. He got back to the United States at Alameda on July 25, 1952. He went to the office of the Pacific Far East Line in San Francisco on the same date. He went to the port purser's office to get his voucher, moneys that he figured were due him, the balance of the amount that was earned during the particular voyage. (Note: He did not tetsify that he said anything like the foregoing to whoever he talked to.) Whoever the gentleman was at the window at the port purser's office looked through the file of vouchers and when he pulled libellant's out, he said: "Mr. Elliott, this is a coincidence. You have $579 earnings and $579 deductions." (Tr. Vol. 11, pp. 11-12.) Up to this time libellant had not been "discharged".

The difference between the sum of $513.50 and $579.24 was what he had earned on coastwise articles prior to the time he signed the (foreign) articles at San Francisco. (Tr. Vol. 11, p. 12.)

After leaving (the purser's office) Pacific Far East Line on July 25, 1952, I contacted my union relative to this; just a routine appeal. I told "the union representative about the $254.04" and *"he was under the same conclusion I was, he figured the same, that I didn't have any coming to me any more than I thought.* I never knew I had any coming to me until I talked to Mr. (David A.) Fall." (Tr. Vol. 11, p. 44.)

While at the office of the Pacific Far East Line in San Francisco I did not receive any money on account

of my wages. I later went to the office of the Shipping Commissioner in San Francisco and did not receive at that place any money on account of my wages. I signed off the articles then, at San Francisco, on July 25, 1952. There was no way I know of to get my discharge from that vessel (S. S. "Canada Bear") without signing off. I signed off in the office of the United States Shipping Commissioner. You have to go before the United States Shipping Commissioner to sign a foreign voyage and you have to go before the United States Shipping Commissioner to get your discharge. (Tr. Vol. 11, pp. 15-16.)

> "Q. Did you at any time later contact the Pacific Far East Line with reference to the wages?
>
> A. The only time Pacific Far East was contacted again was through you, I think, Mr. Fall." (Tr. Vol. 11, p. 17.)

The contact through Mr. Fall was by letter dated April 23, 1953. (Tr. Vol. 11, p. 52; Libellant's Exhibit 1.) This letter does not state the amount which was claimed as the balance of earned wages.

The record is in a sloppy status with reference to the details of the amount of the expenditures or obligations which were incurred by the claimant over and above the total amount of the cash advances made to the libellant and the deductions which were conceded to be proper, but it was stipulated that the sum of $254.04 was deducted on account of hospital bills and other expenses "due to Mr. Elliott's misconduct". (Tr. Vol. 11, p. 27 and pp. 29-30.) It was also stipu-

lated by libellant's proctor that "it was possible, when this voyage was completed and before the seaman signed off, for the boat to have sued him for the amount of the hospital bill." (Tr. Vol. 11, p. 39.)

Claimant's Exhibit "C", a page of the vessel's log-book, shows that the master of the vessel made an entry stating that libellant deserted the vessel at Yokohama, Japan, on June 19, 1952. The Shipping Articles, Claimant's Exhibit "B" show that the voyage ended at San Francisco, California, on June 29, 1952. At that time, line 37, referring to Joseph A. Elliott, stated that he had deserted the vessel at Yokohama, Japan, on June 18, 1952. The word "deserted" was circled and the words "Charge cancelled —see log book" inserted, presumably by the Deputy United States Shipping Commissioner at a later date and not in the presence of the master of the vessel because his initials do not appear in approval of the alteration. Probably this was done at the same time as the sentence "Charge of desertion cancelled by Pac. Far East Lines as seaman was in hospital—see attached. R. A. F. (?) 7/17/52" was written at the bottom of the page upon which the charge of desertion had been entered by the master of the vessel.

Claimant's Exhibit "B" (the Shipping Articles) shows that all of the members of the crew who were on board the vessel at the end of the voyage and had complied with their respective contracts were paid off in the presence of the master and a deputy United States Shipping Commissioner at San Francisco, California, on June 29, 1952 (at which time the libellant

was still in Yokohama, Japan, in a hospital). Twenty-six days later, on July 25, 1952, libellant signed off the articles in the presence of a deputy United States Shipping Commissioner at San Francisco, California, and at said time the articles (line 37) contained the notation "no wages due". (Tr. Vol. 11, p. 38.) This was regarded by the libellant and the deputy United States Shipping Commissioner as the mutual release required by the provisions of Revised Statutes, Section 4552. A certificate of mutual release dated July 25, 1952, directed to Pacific Far East Line, San Francisco, Calif., signed by R. D. Edwards, deputy shipping commissioner *and by Joseph A. Elliott,* stating that there were no wages due, was produced by claimant at the trial and introduced in evidence as Claimant's Exhibit "A". (Tr. Vol. 11, p. 37.)

During the trial of the action it was stipulated that libellant signed on at $262.99 per month; that this monthly wage was increased to $274.79 as of May 15, 1952; that he actually earned wages in the sum of $513.50 between May 8, 1952 and June 18, 1952; that he was advanced the sum of $105.00; that he had "slops" of $16.86; that state unemployment benefits at 1 per cent ($5.77) were taken out; that social security benefits were in the sum of $8.65; and that withholding tax in the sum of $88.20 was taken out. (Tr. Vol. 11, pp. 3-4.) At the start of the trial libellant's proctor stated that there was an issue as to the right of the claimant (cross-appellant) to deduct fines in the sum of $34.98, in that "the libelant claims there were no fines and the respondent claims that they were en-

titled to under federal statute, 46 U.S.C. 701." (Tr. Vol. 11, pp. 4-5.) As the trial proceeded and libellant admitted that the amount of his log fines would probably amount to $34.98, his proctor agreed that the "$34.98 should be added to the other items he (libellant) was charged with". (Tr. Vol. 11, p. 14.) With this concession, made by libellant during the course of the trial, it was then agreed that (subject to an existing mutual release signed by libellant at the office of the United States Shipping Commissioner on July 25, 1952) the balance of wages earned was $254.04. (Tr. Vol. 11, pp. 25-28.)

It may be necessary to refer to other evidence in its brief in reply to appellant's opening brief (not yet served or filed) but for the purposes of its cross-appeal claimant believes the foregoing statement of the case is sufficient.

SUMMARY OF ARGUMENT.

1. The second cause of action in the first amended libel does not allege facts sufficient to state a cause of action for the recovery of the penalty provided for by the Revised Statutes of the United States, section 4529.

2a. The District Court erred in failing to make a finding responsive to the allegation, fourth article (denied in the answer) that the libellant "*fell ill* while the said S. S. 'Canada Bear' was at Yokohama, Japan."

2b. The District Court erred in failing to find that the libellant did not at any time make any demand upon the master of the vessel for one-half part of the balance of his wages earned and remaining unpaid while the vessel S. S. "Canada Bear" was at Yokohama, Japan, in the month of June, 1952.

2c. The District Court erred in failing to find that the libellant was not discharged while the vessel was at Yokohama, Japan, in the month of June, 1952.

2d. The District Court erred in finding that the libellant on July 25, 1952, made a demand upon the Port Purser for claimant Pacific Far East Lines at San Francisco, California, for the wages due to libellant as a member of the crew of the S. S. "Canada Bear" to and including the 19th day of June, 1952.

2e. The District Court erred in failing to find that when the voyage ended at San Francisco on June 29, 1952 (inadvertently referred to as July 17, 1952 in assignment of error number V) and all of the members of the crew who had completed the voyage were paid off and discharged in the presence of a United States Shipping Commissioner that it was impossible for the master of the vessel to pay off and discharge the libellant at the end of the voyage in San Francisco for the reason that the libellant was not, on said date, at any time in the presence of the said master.

2f. The District Court erred in failing to make any finding with reference to the date when the cargo of the vessel had been discharged or the date upon which the libellant was discharged, if in fact he has ever been discharged.

2g. The District Court erred in failing to find that when the libellant left the vessel on June 18, 1952, he knew that it was sailing the next day.

2h. The District Court erred in failing to find that when the agent of claimant was contacted by libellant on June 19, 1952, when libellant was in the hospital, the libellant asked the agent to send him $50.00 when he got a chance and that the agent did so approximately one week later.

2i. The District Court erred in failing to find that claimant has expended for and on account of medical and hospital care required by the libellant during the voyage, and resulting from his own misconduct, a sum in excess of $254.04.

2j. The District Court erred in failing to find that the failure of the libellant to return to the vessel prior to the time it sailed from Yokohama on June 19, 1952, was without the knowledge or consent of the master of the vessel.

2k. The District Court erred in failing to find that it is not true that the master of the S. S. "Canada Bear" was advised prior to the sailing of the vessel that the libellant was in a hospital.

2l. The District Court erred in failing to find that the libellant did not at any time demand from the master of the vessel any part or portion of the balance of his wages earned and remaining unpaid between the time the vessel arrived at Yokohama, Japan, up to and including the time the vessel sailed from Yokohama, Japan.

The portions of the summary of argument 2a to 2m are taken from the claimant's assignments of error. (Tr. Vol. 1, pp. 43-47.)

ARGUMENT.

At the outset claimant desires to state that it would not have taken an appeal from the final decree if the findings prepared by the libellant fully disposed of the issues raised by the pleadings and the factual issues which should have been presented by proper allegations on the part of the libellant in order to present an issue within the provisions of the penalty wage statute involved in a case of this type. Uncertainty in the mind of claimant's proctor with reference to the right in the absence of a cross-appeal to attack the validity of certain findings and the failure to make others which seem to be pertinent and required resulted in filing of claimant's notice of appeal.

POINT 1.

THE SECOND CAUSE OF ACTION OF THE FIRST AMENDED LIBEL FAILS TO ALLEGE FACTS SUFFICIENT TO CONSTITUTE A CAUSE OF ACTION PURSUANT TO THE PROVISIONS OF REVISED STATUTES, SECTION 4529.

It is important to consider this proposition because an analysis of the statute upon which the libellant must rely will show what findings of fact should be made in a case of this kind.

The statute provides, in substance, that the master or owner of any vessel making foreign voyages shall pay to every seaman his wages "within twenty-four hours after the cargo has been discharged, or within four days after the seaman has been discharged, *whichever first happens;* and in all cases the seaman shall be entitled to be paid *at the time of his discharge* on account of wages a sum equal to one-third part of the balance due him. Every master or owner who refuses or neglects to make payment *in the manner hereinbefore mentioned without sufficient cause* shall pay to the seaman a sum equal to two days' pay for each and every day during which payment is delayed beyond the respective periods * * *" (Emphasis added.)

The provisions of R. S. Section 4511 (Title 46 U.S.C. 564) state that the shipping articles "shall be, as near as may be, in the form given in the table marked A, in the schedule annexed to this chapter * * *". Pursuant to the form of shipping articles thus provided for by statute "the said crew agree to conduct themselves in an *orderly, faithful,* honest, and *sober* manner, and to be at all times diligent in their respective duties and to be obedient to the lawful commands of the said master, or of any person who shall lawfully succeed him, and of their superior officers in everything relating to the vessel, and the stores and cargo thereof, *whether on board,* in boats, *or on shore;* and *in consideration of which service,* to be *duly performed,* the said master hereby agrees to pay the said crew, as wages, the sums against their names respectively expressed, and to supply them with provi-

sions according to the annexed scale. * * * And it is also agreed that if any member of the crew considers himself to be aggrieved by any breach of the agreement *or otherwise,* he *shall* represent the same to the *master* or officer in charge of the vessel, in a quiet and orderly manner, who shall *thereupon* take such steps as the case may require. * * *'' (Emphasis added; R. S. Section 4612 (Schedule, Table A, following Title 46 U.S.C. Section 713).)

The second cause of action of the first amended libel does not allege any of the following: 1. That the libellant duly or at all performed his obligations as set forth in the Shipping Articles which he executed. 2. That he considered himself aggrieved by a breach of the agreement *or otherwise* and represented the same to the master or officer in charge of the vessel or that said master or officer failed to take such steps as the case required. 3. The date when the cargo was discharged. 4. The date when or the fact that the libellant was discharged. 5. That there was a neglect or failure on the part of the master or owner, *without sufficient cause,* to pay him his wages within twenty-four hours after the cargo had been discharged or within four days after his discharge, *whichever first happened.*

The second cause of action, first amended libel, alleges that "demand was made upon respondent at San Francisco, California, on the 25th day of July, 1952 for wages due libelant, but payment was refused". (Tr. Vol. 1, p. 4.) He does *not* allege that at or prior to said alleged demand he had been discharged or that

this demand was made or that he presented himself for payment of any claimed wages within twenty-four hours after the cargo of the vessel had been discharged. Furthermore, R. S. Section 4549 (46 U.S.C. Section 641) provides, in substance, that all seamen discharged in the United States from merchant vessels engaged in voyages from a port in the United States to any foreign port *shall* be *discharged and receive their wages* in the *presence* of a *duly authorized shipping commissioner,* except in cases where some competent Court *otherwise* directs; and that "any master or owner of any such vessel who discharges any such seaman belonging thereto, or pays his wages within the United States in *any other manner,* shall be liable to a penalty of not more than $50.00." (Emphasis added.)

Therefore, the libellant could not have been "discharged" in the United States excepting in the presence of a duly authorized shipping commissioner and neither the master nor the owner could have lawfully paid him any wages within the United States excepting in the presence of a duly authorized shipping commissioner.

With reference to Revised Statutes of the United States, Section 4530 (Title 46 U.S.C. Section 597), there is no allegation of facts bringing the case within the provisions thereof. It provides, in substance, that "every seaman on a vessel of the United States shall be entitled to receive *on demand* from the *master* of the vessel to which he belongs one-half part of the balance of his wages earned and remaining unpaid at

the time when such demand is made at every port where such vessel, *after the voyage has been commenced,* shall load or deliver cargo *before the voyage is ended,* * * * Any failure on the part of the master to comply with this demand shall release the seaman from his contract and he shall be entitled to full payment of wages earned. And when the voyage is *ended* every *such* seaman shall be entitled to *remainder* of the wages which shall then be due him, as provided in the preceding section: * * *'' (Emphasis added.)

There is no allegation that libellant made any demand whatever upon the *master* of the vessel for one-half part or any other part of wages earned and remaining unpaid while the vessel was at Yokohama, Japan, or that any such demand was not complied with. Therefore, he was not released from his contract and was not then entitled to full payment of wages earned.

It is apparent from the language "and when the voyage is *ended* every such seaman shall be entitled to the remainder of the wages which shall be *then* due him, as provided in the preceding (R. S. Section 4529, Title 46 U.S.C. Section 596) section" that R.S. Section 4529 was intended to govern the payment of wages of the members of the crew who have fully performed their contractual obligations as set forth in the shipping articles and are members of the crew "when the voyage is *ended*" and perhaps those who are released from their contracts by a failure of the master to comply with a lawful demand for partial payment of wages at some port where the vessel, after the voyage

has been commenced, shall load or deliver cargo *before* the voyage is *ended.*

The opaque allegation that libellant "fell ill" while the vessel was at Yokohama, Japan, did not impose any legal obligation upon the master of the vessel to then and there pay him the balance of his earned wages even if he had faithfully performed his contractual obligations up to that time.

Section 4530, Revised Statutes of the United States, does not state that if a proper and timely demand for a one-half part of earned and unpaid wages is made upon the master of a vessel that a failure of the master to comply with such demand shall constitute a *discharge* of the seaman within the meaning of the penalty provisions of Section 4529. All it states is that the seaman shall, under such circumstances, be released from *his* contract and shall be then and there entitled to full payment of his earned and unpaid wages. This section of the Revised Statutes says absolutely nothing about any penalty of two days' wages for each day of delay in paying such seaman his full earned and unpaid wages. It may be that the Court would construe a release of the seaman from his contract, if the master of a vessel failed to comply with a lawful demand of a seaman for a one-half part of his earned and unpaid wages, as a discharge within the meaning of Section 4529; but that question is not presented by the allegations of the first amended libel. There is no language in either Section 4529 or 4530 which provides that there shall be a penalty imposed

upon either the master or owner of a vessel in the event a seaman becomes ill while the vessel is in a domestic or foreign port or for that reason fails to return from shore leave and complete the voyage.

It is therefore respectfully submitted that the second cause of action in the first amended libel does not allege facts sufficient to constitute a cause of action for the penalty provided for in Section 4529.

POINT 2.

THE DISTRICT COURT ERRED IN MAKING AND IN FAILING TO MAKE FINDINGS OF FACT WITH REFERENCE TO ISSUES RAISED BY THE PLEADINGS AND THE LAW.

At the time libellant's deposition was taken he testified that, other than on the particular voyage involved here, he had been hospitalized for alcoholism probably more than a half dozen times. (Tr. Vol. 11, p. 22.) This, considered in connection with his testimony (supra) that he got into a taxicab after having some drinks in Yokohama, Japan, passed out and remembered nothing until he woke up in a hosiptal the next morning, is substantial evidence in support of an inference that his "illness" was actually intoxication to the extent of practical oblivion. If there is added to this the fact that libellant's proctor stipulated that the hospital expenses were the result of libellant's *misconduct* the conclusion is obvious that the libellant did not conduct himself in a sober manner as he agreed to

do in the shipping articles. He made no demand upon the master for any money while the vessel was at Yokohama, Japan. The only request he made for money was complied with by the agent of claimant. When he got back to San Francisco and went to claimant's office he made no *demand*. His testimony that he went to the port purser's office to get his voucher, "moneys I figured was due me, the balance of the amount that was earned during the particular voyage" is not a recital of anything he claims he said at the time. It is merely a recapitulation of *his* unexpressed intentions. He did not testify that he made any objection to the statement that he had $579.00 earnings and $579.00 deductions. He then went to his union and it was there concluded that he had no wages coming to him. He next went to the office of the United States Shipping Commissioner where it was apparently agreed between libellant and the deputy shipping commissioner that he had no wages coming. He signed off the articles and executed a mutual release and a certificate of mutual release on July 25, 1952.

Unless what happened at the office of the shipping commissioner on July 25, 1952 constituted a discharge of the libellant he has not been discharged at all. The act of signing off was not the result of any fraud, misrepresentation or duress on the part of the claimant. It was done voluntarily, apparently with the advice of libellant's union and a public official, and the claimant was entitled to rely upon libellant's agreement that he was not entitled to any wages until the mutual release was set aside, for good cause shown, by a Court

of competent jurisdiction. When David A. Fall, Esq., made the written demand for an unspecified amount in April 1953 the mutual release was still extant.

The libellant received a valuable consideration for the execution of the mutual release in that he was relieved of the obligation to reimburse the claimant for the expenses incurred as the sole result of his admitted misconduct. He at no time attempted to rescind the mutual release. It was not a void contract.

Under the foregoing circumstances claimant contends that no Court should hold that there was a neglect or failure on the part of the master or owner, without sufficient cause, to pay libellant his wages within twenty-four hours after the cargo had been discharged or within four days after libellant had been discharged. It was impossible for the master to have paid the wages within the time specified if the cargo was discharged at the end of the voyage and before the rest of the crew were paid off because the libellant was not present at that time.

At least during the period of four days after libellant signed off the articles on July 25, 1952 (if this constituted a discharge), he and the claimant entertained the opinion that he was not entitled to any wages. There was certainly no arbitrary or willful neglect or failure to pay earned and unpaid wages during this period. The law requires that wages of a seaman be paid in cash. Libellant did not present himself at any place of business of the claimant during the four day period after he signed off the articles so that he could have been paid. The reason for this

failure is that all parties concerned were of the honest belief that libellant had nothing coming to him.

It is also clear from the record that the actual net amount of earned and unpaid wages was not ascertained or agreed upon until the time of the trial. At the start of the trial the item of fines in the sum of $34.98 was disputed by the libellant. There is no evidence showing that the libellant would have agreed to this deduction at any time before it was resolved in claimant's favor by stipulation during the trial. Libellant alleged in his pleading that the balance due was the sum of $379.24. It was conceded at the trial that this was not the correct amount and that there was no obligation on the part of master or owner of the vessel to have paid said amount.

POINT 3.

AN APPEAL IN A CASE OF ADMIRALTY AND MARITIME JURISDICTION IS A TRIAL DE NOVO AND THIS HONORABLE COURT HAS THE POWER TO CORRECT THE FINDINGS OF FACT WHERE THERE IS NO CONFLICT IN THE EVIDENCE.

The proposition that the United States Court of Appeals has the power to revise and amend findings of fact on a trial *de novo* is so well established that citation of authority seems to be unnecessary.

Cross-appellant is not seeking a reversal of the final decree but does respectfully request that this Honorable Court exercise its discretion to the end that the issues of fact raised by the pleadings and the provi-

sions of Sections 4529 and 4530, Revised Statutes of the United States, will be definitely determined and thus put an end to this litigation.

The burden of proof by a preponderance of substantial evidence rested upon the libellant and for that reason every allegation of fact in second cause of action, first amended libel, which is denied in the answer should be found to be untrue in each instance where the libellant offered no evidence in support of such allegation. There is no evidence to support the allegations that libellant "fell ill" in Yokohama, Japan, or that for that reason he failed to return to the vessel. The plain fact is that he voluntarily breached his written agreement to conduct himself in an orderly and sober manner and consumed enough intoxicating liquor to cause his complete "blackout".

In the interest of brevity, claimant and cross-appellant will not repeat the details in which it requests a revision and amendment of the findings of fact as outlined in the summary of argument, supra, but respectfully requests that this Honorable Court revise and amend the findings in accordance therewith or in such other manner as seems just and equitable under the circumstances shown by the record.

CONCLUSION.

The record shows no ground for the impostition of any penalty upon the claimant. It is therefore respectfully contended that the findings of fact be amended and revised and that the final decree be affirmed.

Dated, Los Angeles, California,
August 11, 1954.

Respectfully submitted,
LASHER B. GALLAGHER,
Proctor for Claimant and Cross-Appellant.